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OFFICE SUPREME COURT, U.S.
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MAY 19 1958
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No. 851

In the

Supreme Court of the United States

October Term, 1958

STATE OF OHIO, on the Relation of PAUL T. KLAPP, Prosecuting Attorney,

Petitioner,

vs.

THE DAYTON POWER AND LIGHT COMPANY and IRVING TRUST COMPANY,

Respondents.

Petition For A Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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Court Index Press, Inc.—Law Printers—869 Walnut Street, Cincinnati 2, Ohio

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are unreported. The District Court's opinion is set forth on page 49a of the record. The opinion of the Court of Appeals is set forth on page 3a of the Appendix attached to the Petition.

JURISDICTION

The jurisdictional grounds are set forth in the Petition.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute governing removal of causes from the State to the District Court in effect at the time this cause was removed is set forth at page 1b herein. The Ohio constitutional and statutory provisions involved are set forth on pages 1b through 5b.

QUESTIONS PRESENTED

1. Respondents accept Petitioner's statement of the first question.

2. Whether an Ohio municipality may require a public utility, which had been serving the municipality and its inhabitants for nearly fifty years without a franchise, to remove its facilities from the streets of such municipality without the consent and authority of The Public Utilities Commission of Ohio?

STATEMENT OF THE CASE

The Petitioner will for convenience be referred to as "City of Piqua", and Respondent, The Dayton Power and Light Company, as "Dayton Company" and Respondent, Irving Trust Company, as "Irving Trust".

Although generally agreeing with the Statement of the Case contained in the Petition of the City of Piqua, Respondents desire to point out that the original petition filed in this cause in the Court of Appeals of Miami County, Ohio on March 25, 1933 (R. 3a) as well as the Amended Complaint filed with the District Court for the Southern District of Ohio on February 23, 1955 (R. 44a) sought the removal of all of the facilities of the Respondent, Dayton Company, from the streets and public places of the

City of Piqua and not just those facilities used for the distribution of electricity in such City. It was only in the argument before the Court of Appeals for the Sixth Circuit that the City of Piqua agreed to file a stipulation limiting the relief sought to those facilities used in local distribution.

JURISDICTION OF THE DISTRICT COURT

This cause was removed from the Court of Appeals of Miami County, Ohio in 1935 under the authority of 28 U. S. Code, Sec. 71, repealed effective September 1, 1948.

ARGUMENT

The City of Piqua has advanced two reasons why this Court should review the decisions of the District Court and the Court of Appeals for the Sixth Circuit which present questions of very limited application and in one instance a question involving a statute no longer in effect.

A. The Question of Removal Is No Longer of Judicial Importance

The City of Piqua presents a question of removal which arose under a statute, 28 U. S. Code, Sec. 71 (p. 1b), repealed September 1, 1948. Thus the issue raised by the City of Piqua as to the removability of this cause to the District Court neither presents an important question of federal law which has not been, but should be, settled by this Court nor a federal question in conflict with the decisions of this Court.

Section 39 of the Act of June 25, 1948, c. 646, 1, 62 Stat. 869, which revised Title 28 of the U. S. Code provides:

> "Sec. 39. The sections or parts of the * * * Statutes at Large enumerated in the following schedules are

hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal."

Section 71, 28 U. S. Code, is referred to in these schedules under the Statutes at Large as the Acts of March 3, 1911, c. 231, 36 Stat. 1094, 1101; January 20, 1914, c. 11, 38 Stat. 278; and January 31, 1928, c. 14, 45 Stat. 54. It is clear therefore that not only is 28 U. S. Code, Sec. 71 applicable to this cause but also that the City of Piqua presents no question of future judicial importance warranting review by this Court. The possibility of the question arising in the future is extremely remote, since over ten years have elapsed since the repeal of Sec. 71.

Even if Sec. 71 had not been repealed the District Court and the Court of Appeals for the Sixth Circuit correctly interpreted and applied Sec. 71 herein. At the time (1935) this case was removed, 28 U. S. Code, Sec. 71, provided in part:

> "* * * And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. * * *"

The cause was removed to the District Court because the pleadings at that point clearly disclosed a separable controversy between Irving Trust, a citizen of New York, and the City of Piqua, a citizen of Ohio. Irving Trust being the Trustee for the bondholders under a pre-existing mortgage of the Dayton Company (R. 24a, 25a). In *Chase*

National Bank v. *Norwalk*, 291 U.S. 431, this Court recognized that a mortgagee such as Irving Trust, whose interest was acquired prior to the beginning of the action, had rights separable and distinguishable from those of its mortgagor.

If, as in *Chase National Bank*, a mortgagee or trustee for the bondholders under a mortgage may maintain a separate suit to determine its rights, then certainly in this cause such mortgagee or trustee as a party defendant has a separable controversy with the City of Piqua. As Mr. Justice Brandeis stated in the *Chase National Bank* case at page 438:

> "For in every case where a mortgage was given before the litigation against the mortgagor was instituted, the mortgagee is entitled to have a decision determining his rights rendered on the basis of the facts and considerations adduced by him."

B. The Decisions Below Are Supported by Ohio Law

Prior to the adoption of the amendment to the Constitution of Ohio in 1912 granting to municipal corporations "Home-Rule" powers (Article XVIII, Section 3, p. 1b) municipalities possessed only those powers expressly granted by the General Assembly of Ohio. *Billings* v. *Railway Company* (1915) 92 Ohio St. 478, 482; *Ravenna* v. *Pennsylvania Co.* (1887) 45 Ohio St. 118.

The City of Piqua was not given statutory authority to grant to an electric light company the right to erect poles and stretch wires as contemplated by the Ordinance of 1884 (R. 34a) until 1886. In *The Hardin-Wyandott Lighting Company* v. *The Village of Upper Sandusky* (1916) 93 Ohio St. 428, the Supreme Court of Ohio said at page 438:

"Prior to 1886 there was no statute conferring power on the municipality to grant to an electric light company the right to erect poles."

See further *Brush Electric Light Company* v. *Jones Brothers Electric Company* (1891) 5 O.C.C. 340, 3 O.C.D. 168; which the City of Piqua neglected to state in the petition (p. 12) was affirmed by the Supreme Court of Ohio. See (1893) 29 W. L. Bull. 72.

Any ordinance purporting to exercise a power not given was and is ultra vires and void. *City of Wellston* v. *Morgan* (1898) 59 Ohio St 147; *Markley* v. *Village of Mineral City* (1898) 58 Ohio St. 430.

The law of Ohio is clear and the Courts below correctly applied this law in holding that the Dayton Company had been occupying the streets and public places of the City of Piqua without the benefit of a franchise. Therefore, under applicable Ohio law the City of Piqua before commencing this cause must apply to The Public Utilities Commission of Ohio under Sections 4905.20 and 4905.21 of the Revised Code of Ohio (Sections 504-2 and 504-3, General Code of Ohio), the "Miller Act" (p. 2b), to secure the consent and authority of such Commission to the abandonment of electric service in the City of Piqua by the Dayton Company. *City of Cincinnati* v. *Public Utilities Commission of Ohio* (1940) 137 Ohio St. 437. *State ex rel. Wear, Pros. Atty.* v. *Cincinnati & Lake Erie Railroad Co.* (1934) 128 Ohio St. 95. The City of Piqua admits such consent and authority has not been obtained. (R. 31a). The City of Piqua has failed to exhaust its administrative remedies. *Aircraft & Diesel Equipment Corporation* v. *Maurice Hirsch et al* (1946) 331 U. S. 752; *Natural Gas Pipeline Co.* v. *Slattery* (1937) 302 U.S. 300.

The City of Piqua argues that Article XVIII, Sec. 3, the "Home-Rule" provisions of the Constitution of Ohio, limit

the applicability of the "Miller Act" (Secs. 4905.20 and 4905.21, Revised Code of Ohio) to the "main line" of any public utility and therefore The Public Utilities Commission of Ohio has no jurisdiction over local distribution facilities. This argument runs contrary not only to the purpose and intent of this Act to protect the consumers of any public utility wherever located but to the language of the statutes themselves. These sections insofar as applicable here provide:

> "4905.20 * * * no public utility * * * furnishing service or facilities within this state, shall abandon or be required to abandon or withdraw any main track or depot of a railroad, or main pipe line, gas line, telegraph line, telephone toll line, electric light line * * *, or the service rendered thereby * * *, nor shall any such facility be closed for * * * service thereon, therein or thereover except as provided in section 4905.21 of the Revised Code. * * *
>
> "4905.21 * * * any * * * political subdivision desiring to abandon or close, or have abandoned, withdrawn, or closed for * * * service or any part of any line * * * referred to in Section 4905.20 of the Revised Code, shall make application to the public utilities commission in writing. * * *
> "* * * the commission shall ascertain the facts * * * and if such facts satisfy the commission that the proposed abandonment, withdrawal or closing for * * * service is reasonable, having due regard for the welfare of the public and the cost of operating the service or facility, it may allow such abandonment, withdrawal, or closing; * * *. If the application asks for the abandonment or withdrawal * * * of any main track, main pipe line, gas line, telegraph line, telephone

> toll line, electric light line * * * or the service rendered thereby, in such manner as can result in the permanent abandonment * * * of service and facilities of any such public utility, no application shall be granted unless the * * * public utility has operated said * * * electric light line for at least five years. * * *"

The word "main" quoted by Petitioner refers only to a railroad track or depot or a "main" pipe line, and clearly does not refer to electric lines. Even if it did the distribution system (lines) of a gas or electric or water company is a system of "main lines", without which service to consumers in the City of Piqua would be impossible. It is without question that the facilities of Dayton Company and the service rendered thereby have been operated for nearly seventy-five years in the City of Piqua.

The relief sought by the City of Piqua in this cause, if granted, would result in the permanent abandonment of electric lines and service to the Dayton Company's electric customers in the City of Piqua. The Public Utilities Commission of Ohio under the statutes quoted above can look to and protect the interests of all parties involved, i.e., City of Piqua, Dayton Company, the electric customers of Dayton Company in the City of Piqua, Irving Trust and the general public.

In *State ex rel Wear, Pros. Atty.* v. *Cincinnati and Lake Erie Railroad Co.* (1934) 128 Ohio St. 95; this same argument concerning the "Home-Rule" provisions of the Ohio Constitution was advanced. The Court at page 101 disposed of this argument as follows:

> "It is asserted, however, that to require the consent of the Public Utilities Commission before the municipality may oust the respondent company from its

> streets is, in effect, to confer * * * the power to grant a franchise. * * * The dedication of property, and the establishment of service upon which the public comes to rely bring into consideration a new and vital interest. The public is interested in the continuance of service, and that interest the Utilities Commission is empowered to conserve."

It should be noted that each case cited by the City of Piqua in support of its "main line" contention involves a railroad and that the "Miller Act" uses the phrase "main line" with reference to railroad property.

The City of Piqua also argues that its constitutional lack of power in 1884 was cured by the enactment of Sections 9195 and 9196, General Code of Ohio, in 1897 (p. 4b). An examination of Section 9196, General Code of Ohio, upon which the City of Piqua relies, discloses that it was intended only to cover situations where "there is an omission or error from want of conformity to the statutes of this state" and not situations where the municipality was without power to accomplish the act as in this cause. Although Section 9195, General Code of Ohio, was substantially re-enacted in 1953 as Section 4933.13, Revised Code of Ohio, Section 9196, General Code of Ohio was repealed in 1949. 123 Ohio Laws 202. In addition *East Ohio Gas Co.* v. *Akron* (1909) 81 Ohio St. 33 and *East Ohio Gas Co.* v. *Cleveland* (1922) 106 Ohio St. 489 involved the interpretation of valid franchise ordinances, and not situations where the municipality was without authority and power to act as here.

As a final effort the City of Piqua calls upon equity to assist its position. It is sufficient to point out that "he who seeks equity must do equity". Is it equitable to deprive customers of Dayton Company of electric service? Is it equitable to require Dayton Company to remove its facili-

ties from the streets and public places of Piqua at a loss to it estimated at $425,000? (R. 1b, 2b).

On page 12a of the Appendix to the Petition, the City of Piqua has printed two sections of the Ohio Municipal Code as revised in 1878. No reference is made to these sections in the Petition itself, but it should be noted that Chapter 3, Section 1 is found in Division 8 of such Code, under the heading "Gas Companies" and Chapter 13, Section 1 is also found in Division 8 under the heading "Streets". There are no provisions in such code covering electric light companies.

The Courts below have followed clear Ohio law and their decisions should stand.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

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J. R. NEWLIN
Of Counsel for Respondent

APPENDIX

REMOVAL STATUTE

28 U. S. Code, Sec. 71 (repealed September, 1948, 62 Stat. 992)

"Removal of suits from State Courts. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction, in any State Court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, in any State Court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. * * *"

OHIO CONSTITUTION

ARTICLE XVIII, Section 3 (Pages Ohio Revised Code, Appendix)

"Sec. 3, Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

OHIO STATUTES

Pages Ohio Revised Code

Section 4905.20 Revised Code (Sec. 504-2, General Code)

"No railroad as defined in section 4907.02 of the Revised Code, operating any railroad in this state, and no public utility as defined in section 4905.02 of the Revised Code furnishing service or facilities within this state, shall abandon or be required to abandon or withdraw any main track or depot of a railroad, or main pipe line, gas line, telegraph line, telephone toll line, electric light line, water line, steam pipe line, or any portion thereof, pumping station, generating plant, power station, or service station of a public utility, or the service rendered thereby, which has once been laid, constructed, opened, and used for public business, nor shall any such facility be closed for traffic or service thereon, therein, or thereover except as provided in Section 4905.21 of the Revised Code. Any railroad or public utility violating this section shall forfeit and pay into the state treasury not less than one hundred dollars, nor more than one thousand dollars, and shall be subject to all other legal and equitable remedies for the enforcement of this section and section 4905.21 of the Revised Code."

Section 4905.21 Revised Code (Sec. 504-3, General Code)

"Any railroad or any political subdivision desiring to abandon, close, or have abandoned, withdrawn, or closed for traffic or service or of any part of a main track or depot, and any public utility or political subdivision desiring to abandon or close, or have abandoned, withdrawn, or closed for traffic or service or of any part of any line, pumping station, generating plant, power station, or service station, referred to in section 4905.20 of the Revised Code, shall make appli-

cation to the public utilities commission in writing. The Commission shall thereupon cause reasonable notice of the application to be given, stating the time and place fixed by the Commission for the hearing of said application.

"Upon the hearing of said application, the Commission shall ascertain the facts and make its finding thereon, and if such facts satisfy the commission that the proposed abandonment, withdrawal, or closing for traffic or service is reasonable, having due regard for the welfare of the public and the cost of operating the service or facility, it may allow such abandonment, withdrawal, or closing; otherwise it shall be denied, or if the facts warrant, the application may be granted in a modified form. If the application asks for the abandonment or withdrawal of any main track, main pipe line, gas line, telegraph line, telephone toll line, electric light line, water line, steam pipe line, pumping station, generating plant, power station, service station, or the service rendered thereby, in such manner as can result in the permanent abandonment of service between any two points on such railroad, or of service and facilities of any such public utility, no application shall be granted unless the railroad or public utility has operated said track, pipe line, gas line, telegraph line, telephone toll line, electric light line, water line, steam pipe line, pumping station, generating plant, power station, or service station for at least five years. Such notice shall be given by publication in a newspaper of general circulation throughout any county or municipal corporation which has granted a franchise to said railroad or public utility, under which said track, pipe line, gas line, telegraph line, telephone toll line, electric light line, water line, steam pipe line, pumping station, generating plant, power station, or service station is operated or in which the same is located, once a week for four consecutive weeks before the hearing of said application. Notice of said hearing shall be given such county, municipal corporation or public

utility in the manner provided for the service of orders of the commission in section 4905.53 of the Revised Code. This section and section 4905.20 of the Revised Code do not apply to a gas company when it is removing or exchanging abandoned field lines.

"The provisions of this section shall apply to all service now rendered and facilities furnished or hereafter built and operated and an order of the public utilities commission authorizing the abandonment or withdrawal of any such service or facility shall not affect rights and obligations of a railroad or public utility beyond the scope of said order, anything in its franchise to the contrary notwithstanding."

Section 4933.13 Revised Code (Sec. 9195, General Code)

"A company organized for supplying electricity for power purposes, and for lighting the streets and public and private buildings of a municipal corporation, may manufacture, sell, and furnish the electric light and power required in such municipal corporation for such or other purposes. With the consent of the municipal corporation, under such reasonable regulations as such municipal corporation prescribes, such company may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares, and public places of such municipal corporation, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires."

Pages Ohio General Code

Section 9196, General Code (repealed 1949, 123 Ohio Laws 202)

"When contracts for electric lighting have been heretofore entered into in which there is an omission or error from want of conformity to the

statutes of this state, but which contracts have been made as herein required, and when by reason of the expenditure of money or labor in the performance of such contracts, or on any other account, it is just and equitable fully to execute them, in such cases the courts are authorized to uphold such contracts as binding on all parties to them and to carry them into effect as though no such defect, omission or error existed, any law of this state to the contrary notwithstanding."